IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33280

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 641**
	)	
Plaintiff-Respondent,	)	**Filed: September 12, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
KENNETH DON RUNKLE,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

Judgment of conviction for possession of a controlled substance with intent to deliver, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ralph R. Blount, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Chief Judge

Kenneth Don Runkle appeals from his judgment of conviction for possession of methamphetamine with intent to deliver and for being a persistent violator. We affirm.

I.

FACTS AND PROCEDURE

On November 3, 2005, Idaho State Police Detective Elizabeth Bradbury was conducting surveillance on Robert Gamble's residence. She watched as a dark colored pickup truck arrived at the house and a man, whom she identified as Runkle, exited and went into the house where he remained for ten to twenty minutes. Runkle then reentered the truck, drove away and returned about forty minutes later. He again went inside the house and came out approximately ten minutes later with a man Detective Bradbury identified as Gamble. She watched as Runkle put a

white plastic grocery bag into a toolbox in the bed of the pickup and then drove away. Gamble reentered the house.

Shortly after Runkle left Gamble's house the second time, Officer Christopher Donahue, an Idaho State Trooper, stopped Runkle's truck and arrested him for driving without privileges. In searching the truck, the officer found in the toolbox the white plastic bag which contained women's clothing, a box of condoms, and a sealed plastic baby bottle liner containing a little over 27 grams of methamphetamine. Officer Donahue then questioned Runkle, who claimed the drugs did not belong to him and asked where they had been found. Later, Runkle asked the officer whether there was anything he could do to make any drug charges "disappear." Cash in the amount of $1,036 was found in Runkle's pant's pocket, which Runkle told the officer was the proceeds from a car he had just sold.

Contemporaneously with Runkle's arrest, a search warrant was executed at Gamble's residence. In addition to smelling the distinct odor of methamphetamine manufacture, in searching the house and the outbuildings the officers found large amounts of methamphetamine manufacturing materials, various drug paraphernalia (including a box of baby bottle liner bags), assorted documents including an address book listing Runkle's name, and drug ledgers, one which listed the name "Skinacles." Gamble's cell phone was found, which contained the name "Skinacles" associated with Runkle's phone number. The officers also discovered multiple bags of methamphetamine (a total of approximately 80 grams) and over $6,000 in cash.

Runkle was charged with possession of a controlled substance with intent to deliver, Idaho Code § 37-2732(a)(1)(A), conspiracy to deliver methamphetamine, I.C. §§ 37-2732(a)(1)(A), 18-1701, and being a persistent violator, I.C. § 19-2514. Gamble was arrested and charged with trafficking in methamphetamine, unlawful possession of a firearm, delivery of a controlled substance, conspiracy to deliver methamphetamine, trafficking in methamphetamine by manufacturing, and being a persistent violator. Shortly thereafter, the state filed a motion for joinder, seeking to join the two defendants' cases. Over both Gamble's and Runkle's objections, the district court granted the motion.

The state then filed a notice of intent to introduce Idaho Rule of Evidence 404(b) evidence that on July 8, 2005, (four months prior to the events at issue at trial), Gamble, while on a motorcycle, had unsuccessfully tried to elude a police officer. When he was arrested, he had on his person a large amount of cash, drug ledgers, and an address book containing the name and

phone number for Runkle. Both defendants objected to the introduction of the evidence, but the court allowed its admission with limited exception.

After the state rested at trial, Gamble and Runkle moved for dismissal of the conspiracy charges on the basis that a conspiracy to deliver cannot be sustained when the only delivery is from one principal to another without any allegation that there was a mutual plan to deliver to a party besides the two principals. The court agreed and dismissed the conspiracy charges. The defendants then moved for a mistrial on the ground that the Rule 404(b) evidence had been admitted only to prove a connection between the two men for the purposes of the conspiracy charge and now that those charges had been dismissed, the evidence was no longer relevant and was highly prejudicial. The court denied the motion, but gave the jury a cautionary instruction that they should consider evidence of the July 2005 eluding incident only on the issues of "intent and knowledge."

Runkle's remaining charge (the persistent violator allegation was heard by the court) went before the jury who found him guilty. After the court found that he was a persistent violator, his judgment of conviction was entered. Runkle now appeals.

II.
ANALYSIS

A. Joinder and Motion to Sever

Runkle contends the district court erred in joining his case with Gamble's and denying his motion for severance. Specifically, he argues that the basis for the joinder, the alleged conspiracy between the two, was not charged in good faith, there existed potential *Bruton*[1] problems, and joinder of his case with Gamble's denied his "compulsory process" right to call Gamble as a witness. He also contends the court erred in denying his motion to sever due to the prejudice inflicted by the joinder of the cases.

1. Joinder

Whether joinder was proper is a question of law over which we exercise free review. *State v. Anderson*, 138 Idaho 359, 361, 63 P.3d 485, 487 (Ct. App. 2003). Idaho Criminal Rule 13 allows a trial court to "order two (2) or more complaints, indictments or informations to be

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[1] *Bruton v. United States*, 391 U.S. 123 (1968), protects a defendant from incriminating out-of-court statements of a co-defendant being used against him in a joint trial where the co-defendant does not testify and thereby subject himself to cross-examination.

tried together if the offenses, and the defendants if there is more than one (1), could have been joined in a single complaint, indictment or information. Idaho Criminal Rule 8(a) provides that joinder of offenses in a single complaint, indictment or information is proper "if the offenses charged . . . are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan. The joinder of defendants is proper if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." I.C.R. 8(b). Thus, offenses may be joined if there is a factual connection or if they constitute part of a common scheme or plan, and importantly, the propriety of joinder is determined by what is alleged, not what the proof eventually shows. *State v. Field*, 144 Idaho 559, 565, 165 P.3d 273, 279 (2007); *State v. Cochran*, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975); *State v. Cook*, 144 Idaho 784, 790, 171 P.3d 1282, 1288 (Ct. App. 2007).

a. Conspiracy charge

Runkle argues the court erred in joining his case with Gamble's because the only overlapping charge, conspiracy to deliver methamphetamine, was not charged in good faith. The state disagrees, arguing the prosecutor had a good faith belief that the evidence would show that Gamble and Runkle were engaged in a conspiracy to distribute methamphetamine to parties other than each other.

It is well settled that the essential elements of conspiracy are: (1) the existence of an agreement to accomplish an illegal objective, (2) coupled with one or more overt acts in furtherance of the illegal purpose and (3) the requisite intent necessary to commit the underlying substantive offense. *State v. Munhall*, 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct. App. 1990). In arguing that a conspiracy between the parties did exist, the state contended there was sufficient evidence to show that Gamble and Runkle had engaged in actions meeting the elements of conspiracy. It alleged that the overt act in furtherance of the conspiracy was Gamble's delivery of nearly an ounce of methamphetamine to Runkle when Runkle was observed at Gamble's residence picking up a white plastic grocery bag--later found to contain methamphetamine--and placing it in his truck.

Runkle bases his argument that the prosecutor did not a have a good faith belief that a conspiracy case could be sustained largely on his contention, and the court's ruling, that to prove a conspiracy to deliver there must be evidence that the parties agreed to deliver to a party other

than themselves. However, as the district court noted, there existed no caselaw in Idaho at the time the prosecutor was charging the case requiring such proof.[2] Thus, we will not find that the prosecutor did not charge the crime in good faith by failing to provide evidence that the parties agreed to deliver to others where there did not exist any law in the jurisdiction making that element a requirement. Accordingly, we hold that the district court did not err in joining the cases despite the fact that the conspiracy charge was later dismissed.

b. *Bruton*

Runkle argues the court erred in joining his trial with Gamble's given there existed a potential *Bruton* problem. *Bruton v. United States*, 391 U.S. 123 (1970), protects a defendant from incriminating out-of-court statements of a co-defendant being used against him in a joint trial where the co-defendant does not take the stand and thereby becomes subject to cross-examination.

Runkle asserts that *Bruton* is applicable to this case because "there was potential for Mr. Gamble to attempt to implicate Mr. Runkle by stating that he was aware that a full methamphetamine lab was active at his residence, and that, therefore, visitors to his house, such as Mr. Runkle, were aware of its existence." It is not, however, obvious from where Runkle draws this argument. The only reference to a statement by Gamble was made by Runkle's counsel at a pre-trial hearing wherein he told the court that, with regard to a *Bruton* issue, "the only statement that I am aware of that Mr. Gamble made to investigating officers is . . . where they questioned him about whether he had any knowledge of the methamphetamine laboratory in his residence. And he said in response that he didn't believe that there was a full meth lab in his house." Counsel goes on to characterize this statement as creating the potential for "finger-pointing" by Gamble to Runkle, noting that "[i]t wouldn't be the first time . . . that somebody who resides in a residence . . . said that they weren't aware of an active methamphetamine laboratory or that it must be somebody else that was cooking in their house. So there is the potential there that Mr. Gamble could accuse my client of that."

To infer that Gamble's statement somehow implicates Runkle in being the operator of the methamphetamine lab, or even knowing about it, is much too strained a reading of the plain language of the statement--there is simply no basis to infer that Gamble's denial of knowledge

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[2] Recently, this Court acknowledged the issue was open in *State v. Warburton*, ___ Idaho ___, ___ P.3d ___ (Ct. App. 2008), but we resolved the case without deciding the point.

that a full methamphetamine lab was operating in his residence in some manner pointed a finger at Runkle as being the culprit. Furthermore, even assuming it was the least bit accusatory, we have held that *Bruton* was meant to be applied where "the powerfully incriminating extrajudicial statements of a [non-testifying] codefendant, who [stood] accused side-by-side with the defendant, [were] deliberately spread before the jury in a joint trial." *State v. Gamble*, ____ Idaho ____, ___ P.3d ___ (Ct. App. 2008) (quoting *Bruton*, 391 U.S. at 135-36). This is not such an instance--there was not even a minimally accusatory statement at issue, let alone a "powerfully incriminating" allegation. *See Gamble*, ___ Idaho at ___, ___ P.3d at ___ (holding that Runkle's statement to investigators that he did not know that drugs were in the bag in his truck was not "powerfully incriminating" as to Gamble's complicity). *Cf. State v. Caudill*, 109 Idaho 222, 225, 706 P.2d 456, 459 (1985) (holding that where a co-defendant told police that he had "stabbed my arm when *we* killed him" implicated *Bruton*); *State v. Scroggins*, 110 Idaho 380, 382, 716 P.2d 1152, 1154 (1985) (holding that *Bruton* was implicated where a co-defendant's girlfriend testified that a co-defendant had told her that "I think *we* killed him" in reference to his complicity in the murder with his co-defendant). The court did not run afoul of *Bruton* in granting the state's motion for joinder.

c. Due process and compulsory process

Runkle argues that due to his case being tried with Gamble's, he was "denied his right to call Mr. Gamble as a witness on his behalf because Mr. Gamble would have exercised his Fifth Amendment Rights." He bases this contention on an exchange after the all parties rested:

> [Counsel for Runkle:] . . . I had subpoenaed Mr. Gamble to testify on Mr. Runkle's behalf. I did not call him as a defense witness for Mr. Runkle because I was advised and knew in fact that he would not testify, after discussing that matter with his attorney. So there was no point to call him as a witness.
>
> [Court:] Mr. Gamble would have asserted the Fifth Amendment rights?
>
> [Counsel for Gamble:] Yes. If this case would have been separate trial, we would have testified that Mr. Runkle was not Mr. Skinkles [sic] but because it would open the doors to other matters, I advised him not to testify.

The state points out, however, that Runkle never raised this claim before the trial court either as a separate issue or as a reason for severance or misjoinder and thus we cannot consider the issue on appeal unless it is fundamental error. This Court will not address an issue not preserved for appeal by an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645,

945 P.2d 1390, 1391 (Ct. App. 1997). However, we may consider fundamental error in a criminal case, even though no objection was made at trial. *Id*. Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994).

We agree that Runkle's mention of the issue under the guise of "making a record" after all parties had rested is not sufficient to constitute an objection below. However, even assuming, without deciding, that it was error for the court to try Runkle's case with Gamble's for this reason, we conclude the error would be harmless given the compelling evidence presented that Runkle was knowingly in possession of methamphetamine and the likely low probative value of any testimony offered by Gamble on his behalf. *See State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886, 892 (2007) (noting that even when fundamental error has occurred, a conviction is not reversible if that error is harmless). While Runkle claimed that he was not aware that drugs were present in his vehicle, there was significant evidence presented that he was, in fact, a knowing participant. When Gamble was arrested on the eluding charge, the name "Ken R." and his phone number were found in an address book in Gamble's possession. Additionally, Runkle was seen entering Gamble's residence in which extensive drug paraphernalia and equipment for the manufacture of methamphetamine was found a short time later in plain view, his name and phone number, and the name "Skinacles" with the same phone number, were found programmed into cellular telephones located in Gamble's residence; and "Skinacles" was on drug ledgers found in Gamble's possession on the day of Runkle's arrest, indicating large dollar amounts for drugs obtained on credit. Upon his arrest, Runkle was found with over $1,000 in his pockets, despite the fact that he was unemployed, and the arresting officer testified that Runkle asked him what he could do to make the drug charges "disappear." In concert with the fact that he was seen putting a bag containing methamphetamine that he had received from Gamble into his truck, this evidence strongly points to his knowing possession of drugs.

Furthermore, as the state points out, as the defendant against whom the state had introduced compelling evidence of involvement in drug manufacturing, Gamble would seem to have very little credibility, had he testified. And even if the jury believed an assertion that Runkle was not "Skinacles," there still remained significant evidence that Runkle had knowledge

that drugs were in the bag found in his truck. Accordingly, assuming the court erred in denying Runkle "compulsory process" by joining the trials, such an error would be harmless.

2. Motion to sever

Actions properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that a joint trial would be prejudicial. *Field*, 144 Idaho at 565 n.1, 165 P.3d at 279 n.1; *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 73, 539 P.2d at 1001. The defendant has the burden of showing such prejudice. *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 74, 539 P.2d at 1002. A ruling on a motion for severance is reviewed for abuse of discretion. *State v. Nunez*, 133 Idaho 13, 22, 981 P.2d 738, 747 (1999).

Runkle asserts that he was prejudiced by his case being joined with Gamble's--and thus by the court's refusal to sever the cases--because the jury then heard evidence concerning the drug operation at Gamble's residence as well as the information concerning Gamble's arrest in July after the evidence was no longer relevant because the conspiracy charge had been dismissed. Specifically, he contends that the prejudice to him stemmed from the fact that the jury heard evidence that the residence he had just visited was a residence containing a functional methamphetamine lab that was owned by a man who had assaulted a police office several months earlier. As a result, Runkle contends, the jury could have "easily concluded" that he was involved in "more drug offenses" than those for which he was charged. He claims that the evidence "invited the jury to conclude that [he] was indeed involved with such nefarious activity."

Here, we conclude the showing of prejudice is tenuous. First, we note that it is unlikely that the jury was moved to convict Runkle upon evidence that Gamble had attempted to elude a police officer some months before Runkle was arrested. On the other hand, it well may be that the jury was convinced, in part, to convict Runkle because of evidence concerning the discovery of drugs and related paraphernalia at Gamble's residence. However, such evidence would have been admissible even if Runkle's case had not been joined with Gamble's for trial. The police had seen Runkle go inside Gamble's residence twice on the day of his arrest. Such evidence corroborated the allegation that Runkle was engaged in buying drugs from Gamble and aware of the presence of the methamphetamine found in his vehicle, thus undermining his defense that he had no knowledge of it.

B. Rule 404(b) Evidence

Runkle argues that the district court committed reversible error by admitting testimony regarding unrelated bad acts committed by Gamble. Specifically, Runkle challenges evidence of Gamble assaulting and eluding an officer and subsequently being found with over $8,000 in cash and a card, which the officer characterized as a drug ledger, containing the name "Skinacles" and an address book listing the name "Ken R." followed by a telephone number.

However, we need not decide the issue because we conclude that even if the evidence was improperly admitted against Runkle, it was harmless error. Idaho Rule of Evidence 103 provides that error in the admission or exclusion of evidence will not result in reversal unless it prejudices a substantial right of the defendant. An error in the admission of evidence may be deemed harmless, but only if it appears from the record that the error did not contribute to the verdict. *State v. Brazzell*, 118 Idaho 431, 435, 797 P.2d 139, 143 (Ct. App.1990). In the criminal context, an evidentiary error requires that the conviction be vacated unless the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error. *Id*.

As we discussed above, there is compelling evidence that Runkle knowingly possessed methamphetamine. Furthermore, the only reference to Runkle in the evidence presented from the July incident is his name and a corresponding phone number found on Gamble's person and a reference to "Skinacles" on the drug ledger--a connection that was made separately by evidence later found in the search of Gamble's residence and Gamble's person on the day the search warrant was executed. Specifically, officers found an address book listing Runkle's name, a cell phone containing a listing for "Skinacles" accompanied by Runkle's phone number, and a drug ledger containing the name "Skinacles." Accordingly, we conclude beyond a reasonable doubt that even absent the alleged 404(b) evidence, the jury would have reached the same result.

C. Judicial Misconduct

Runkle argues that at the conclusion of Detective Bradbury's testimony, the judge improperly commented on Detective Bradbury's credibility, thus committing reversible error. The exchange to which Runkle refers occurred as follows:

The Court:	Okay. My turn.
Detective Bradbury:	Okay.
The Court:	Isn't it a fact, Detective Bradbury, that as a teenage state trooper you were in the habit of citing inoffensive judges for driving just a little bit too fast on Lewiston Hill?

Detective Bradbury:	That's correct, Your Honor.
The Court:	You can step down.
Detective Bradbury:	Thank you.
The Court:	I have no further questions.
Detective Bradbury:	Thank you.
The Court:	And I was going too fast.

Initially, the state argues that the issue is not preserved, because Runkle did not object to the judge's comments. It is true that Runkle did not object and where a defendant fails to voice such an objection at trial, this Court will only review a judge's questioning for fundamental error. *State v. Lovelass*, 133 Idaho 160, 165, 983 P.2d 233, 238 (Ct. App. 1999). Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *Babb*, 125 Idaho at 940, 877 P.2d at 911.

Several times, this Court has elucidated the permissible scope of judicial questioning pursuant to Idaho Rule of Evidence 614. *See Lovelass*, 133 Idaho at 165, 983 P.2d at 238; *Milton v. State*, 126 Idaho 638, 642, 888 P.2d 812, 816 (Ct. App. 1995). It is integral that such questioning cannot express approbation for or prejudice toward one party. *Id.* A court's questioning is necessarily limited to clarification of evidence, controlling the presentation of evidence, the prevention of undue repetition of testimony, and to limit counsel to evidentiary rulings. *Id*.

Here, we are not convinced the trial judge's comments were so egregious as to threaten the very foundation of Runkle's case. We do recognize that such an interaction may have the effect of "aligning" the judge with one side in the eyes of the jury, but given the brevity and relatively benign content of the exchange, we cannot say that Runkle was denied a fair trial as a result. Contrary to what Runkle asserts, the statements were somewhat cryptic and did not evidence an explicit "high opinion" of Detective Bradbury. We also do not think the content of the conversation bolstered Detective Bradbury's testimony in any appreciable way--she had testified in great detail, with corroboration from other officers and evidence presented by the state as to Gamble's interaction with Runkle where Runkle ended up with a bag containing methamphetamine in his truck. The judge's comments were not fundamental error.

III.

CONCLUSION

The district court did not err in granting the state's motion for joinder on the grounds that the conspiracy was not charged in good faith or that joinder was precluded by the application of *Bruton*. And, even if the court erred in joining the trials due to Runkle's due process and compulsory process concerns, such an error was harmless given the compelling evidence of Runkle's guilt. The court also did not err in refusing to grant Runkle's motion for severance as there was no unfair prejudice to make denial of the motion an abuse of discretion. Additionally, any error in admitting evidence of Gamble's previous eluding incident was harmless. Finally, the trial judge's comments allegedly regarding the credibility of a state's witness do not rise to the level of fundamental error. Runkle's judgment of conviction is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.